

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KERRIE MOORE and KELLIE MOORE,

Plaintiffs,

v.

KING COUNTY FIRE PROTECTION
DISTRICT NO. 26, et al.,

Defendants.

CASE NO. C05-442JLR

ORDER

This matter comes before the court on Plaintiffs' motions in limine (Dkt. ## 170, 172), Defendants' motions in limine (Dkt. ## 166, 168), a motion to strike from Plaintiffs (Dkt. # 179), and a motion to strike from Defendants (Dkt. # 203). The court has reviewed the parties' pleadings, and has heard from the parties at the pretrial conference regarding certain motions.

I. Plaintiffs' Multi-part Motion

The court adopts Plaintiffs' numbering for purposes of addressing their ten-part motion in limine (Dkt. # 172). To avoid confusion, the court will refer to each part of this motion as a "request."

1 The court DENIES Plaintiff's first request. Mr. Moore's allegedly inappropriate
2 behavior on the job is relevant to the extent it provides a non-retaliatory explanation for
3 any animosity that Chief Lawrence exhibited toward Mr. Moore. The court cautions
4 Defendants that it will permit evidence of Mr. Moore's inappropriate behavior only to the
5 extent that it is relevant to this purpose. Whatever "inappropriate" behavior Mr. Moore
6 may have engaged in, the evidence shows that the District knew about this behavior, and
7 yet terminated him solely for his excessive absenteeism.

9 The court notes that in opposing this request, as in several others, the District
10 improperly attempts to rely on the rule for after-acquired evidence first announced in
11 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-62 (1995). This rule
12 applies only when a defendant accused of terminating a plaintiff for an improper purpose
13 learns, *after termination*, of a legitimate alternate reason for termination. See id.; see also
14 Janson v. North Valley Hosp., 971 P.2d 67, 72 (Wash. Ct. App. 1999) (applying
15 McKennon rule to discrimination claims under Washington law). Here, there is no
16 evidence that any Defendant learned of Mr. Moore's "inappropriate" workplace behavior
17 *after* the District terminated him. Instead, they knew of his inappropriate behavior when
18 it occurred, and chose not to terminate him for it.

20 The court DENIES Plaintiffs' second request, which seeks a blanket order
21 excluding any mention of Mr. Moore's use (or abuse) or prescription painkillers and
22 alcohol. Defendants may, *through qualified expert witnesses only*, seek to prove that Mr.
23 Moore's emotional distress is due in part to his drug and alcohol use. They may also seek
24 to prove, *through qualified medically-trained witnesses only*, that the absenteeism which
25 led to Mr. Moore's termination was caused by his drug and alcohol use rather than
26 another medical condition. The court reiterates its statement at the pretrial conference
27
28

1 that it will not permit the trial to devolve into a sideshow presentation of Mr. Moore's
2 struggles with painkillers and alcohol.

3 Defendants also seek to portray evidence of Mr. Moore's drug and alcohol use as
4 after-acquired evidence justifying termination. On the record before the court, the court
5 is not satisfied that there is any *after-acquired* evidence of drug use that would justify
6 termination. The evidence reveals that the District was aware for many years that Mr.
7 Moore had issues relating to painkiller use, but chose not to discipline him. Thus, the
8 court rules that before presenting evidence of drug or alcohol use to support an after-
9 acquired basis for terminating Mr. Moore, Defendants must make an offer of proof
10 outside the presence of the jury.
11

12 The court DENIES Plaintiffs' third request. The court declines to impose a
13 blanket prohibition on evidence that Mr. Moore was terminated for reasons other than his
14 excessive absenteeism. The court notes however, that Chief Polhamus testified on two
15 separate occasions that the District's sole basis for terminating Mr. Moore was his
16 excessive absenteeism. If the District presents contrary evidence, they will be
17 impeaching their own witness.
18

19 The court GRANTS Plaintiffs' fourth request. The District may not present
20 evidence that Mr. Moore violated the District's attendance policy prior to his February
21 2004 injury. The District may, however, present evidence that it accommodated Mr.
22 Moore by not rigidly applying its rule requiring advance notice before commencing
23 medical leave.
24

25 The court GRANTS Plaintiffs' fifth request. The District may not argue that
26 paying a judgment in this action would strain its financial resources, nor may it argue that
27 the judgment would adversely affect the firefighting services the District provides. In
28 addition, the court reiterates its prior ruling that the District may not argue to the jury that

1 it is deserving of special treatment because its firefighters provide a valuable public
2 service.

3 The court GRANTS Plaintiffs' sixth and seventh requests. With the dismissal of
4 Mr. Moore's due process claims, the collective bargaining agreement no longer plays a
5 role in this action. Defendants may not argue that the termination of Mr. Moore complied
6 with the agreement, and Plaintiffs may not argue that the termination violated the
7 agreement. The court also finds that Mr. Moore's failure to grieve his termination with
8 his union is irrelevant.¹

10 The court GRANTS Plaintiffs' eighth request. The court finds no competent
11 evidence that Mr. Moore's sexual abuse as a minor has any impact on the emotional
12 distress he experience as a result of Defendants' conduct.

13 The court GRANTS Plaintiffs' ninth request. Putting aside the numerous hearsay
14 concerns arising from Chief Polhamus's communications with the Washington
15 Department of Labor and Industries, the opinion of the Department's employees
16 regarding the propriety of Mr. Moore's termination is irrelevant.

18 The court GRANTS Plaintiffs' tenth request. The court finds Mr. Moore's failure
19 to appear at the Board of Commissioners' meeting is not relevant to his remaining claims
20 or to his damages.

21 **II. Plaintiffs' Motion to Exclude Testimony from Dr. Tye Hunter**

22 As the court expressed at the pretrial conference, the court has grave concerns
23 regarding Dr. Hunter's methodology and conclusions. The parties' briefing, however,
24 does not provide the court with sufficient basis to rule on the admissibility of his
25

26 ¹Throughout this order, a ruling that evidence is "irrelevant" is shorthand for a ruling that
27 the evidence either has no relevance, or such little relevance that its "probative value is
28 substantially outweighed" by the concerns of prejudice, confusion, or waste of time expressed in
Fed. R. Evid. 403.

1 testimony. The court therefore DENIES Plaintiffs' motion to exclude Dr. Hunter (Dkt.
2 # 170) without prejudice. The court will reconsider Plaintiffs' arguments after a Daubert
3 hearing. The parties shall contact the court as soon as possible regarding scheduling the
4 hearing. Only two witnesses will testify at the hearing: Dr. Hunter and Dr. Andrea
5 Jacobsen.

6 **III. Plaintiffs' Motion to Strike**

7
8 The court DENIES Plaintiffs' motion to strike (Dkt. # 179), and notes that the
9 court seriously considered sanctioning Plaintiffs' counsel for bringing this motion.

10 Defense counsel immediately cured their violation of the protective order when counsel
11 notified them. Nonetheless, Plaintiffs brought an improper motion to strike², for no
12 discernible valid reason. The court finds no merit in the motion.

13 **IV. Defendants' Multi-part Motion in Limine**

14 Defendants have filed a 26-part motion in limine (Dkt. # 166). Except as stated
15 below, the court DENIES the motion without prejudice to raising specific objections to
16 testimony during trial. Thirteen of the 26 parts of the motion are requests that the court
17 resolve the relevance of particular snippets of witness testimony based solely on the
18 transcript of the witness's deposition and a few sentences of argument from counsel.
19 Neither the transcripts nor the briefing provide the court with a sufficient basis to rule for
20 or against Defendants.

21
22 The court DENIES Defendants' first request. The motion appears to be a request
23 that the court enforce Fed. R. Civ. P. 15. The parties can safely assume that the court
24 will apply the Federal Rules of Civil Procedure, but Defendants' request gives the court
25

26
27 ²Despite Plaintiffs' suggestion to the contrary, they are not at liberty to ignore this
28 District's local rules when they deem an issue to be of sufficient importance. See Local Rules
W.D. Wash 7(g) (prohibiting separately-filed motions to strike).

1 no examples of an theory of relief not presented in Plaintiffs' pleadings, and thus no basis
2 for a ruling.

3 The court GRANTS Defendants' second request. No non-party witnesses may
4 observe courtroom proceedings until he or she has testified. The court also directs the
5 parties to meet and confer to consider, in light of the court's prior rulings, whether any of
6 the Defendants originally named in this action should be dismissed as parties.

7
8 The court GRANTS Defendants' third request. No witness or attorney may
9 discuss or mention the District's liability insurance.

10 The court GRANTS in part and DENIES in part Defendants' fourth request. As
11 stated at the pretrial conference, parties must give notice of witnesses who will testify live
12 or by deposition at the close of trial on the preceding day. This ruling does not apply to
13 exhibits.

14 The court DENIES Defendants' fifth request. Plaintiffs can decline to present
15 damages arguments during closing argument at their peril. If they do so, provided that
16 Defendant does not present damages arguments during closing argument, Plaintiffs will
17 not be permitted to present damages arguments for the first time in rebuttal argument.

18 The court DENIES Defendants' sixth request without prejudice. Defendants have
19 provided no examples of any objectionable medical records. The court is therefore
20 without sufficient basis to decide whether it should exclude portions of certain medical
21 records.

22 The court GRANTS Defendants' seventh request. Evidence of either parties'
23 litigation expenses is not admissible at trial.

24 The court GRANTS in part and DENIES in part Defendants' eighth request.
25 Neither party may suggest or argue that the District's decision to reinstate Mr. Moore has
26 any bearing on whether the District's prior conduct was lawful or unlawful. With that
27
28

1 caveat, however, it is clear to the court that it will be impossible to present this case to a
2 jury without revealing that Mr. Moore was reinstated after this litigation began.

3 The court GRANTS in part and DENIES in part Defendants' ninth request.
4 Generally speaking, neither parties' relative wealth or poverty is relevant in this action.
5 To the extent that Mr. Moore's financial concerns compounded his emotional distress,
6 however, such evidence is relevant.

7 The court GRANTS Defendants' tenth request, which seeks to exclude
8 "inflammatory hyperbolae" [sic]³ from counsel.

9 The court GRANTS Defendants' eleventh request. Counsel should familiarize
10 themselves with the courtroom technology. If counsel use the technology properly, it will
11 ensure that the jury will not see an exhibit until the court has admitted it into evidence.

12 The court DENIES Defendants' twelfth request without prejudice. The court will
13 enforce the limitations on evidence of prior bad acts found in Fed. R. Evid. 404. Beyond
14 that, the Defendants' motion provides the court with no specific evidence on which to
15 base a ruling.

16 The court GRANTS Defendants' thirteenth request. No party shall mention these
17 motions in limine to the jury.

18 **V. Defendants' Motion to Exclude William Skilling**

19 The court DENIES this motion (Dkt. # 168). Mr. Skilling may testify regarding
20 Mr. Moore's job opportunities during the time he was unemployed. To the extent that
21
22
23
24

25 ³At the insistence of the court's law clerk, who is what the court will refer to as a "math
26 geek," the court notes that the word "hyperbolae" is the plural of "hyperbola," which is the term
27 for the locus of points on a plane for which the difference of the distances from two fixed points
28 is constant. "Hyperbolae" are formed by certain intersections of a plane with a right circular
cone. "Hyperbole" is formed when a person (often, but not necessarily, an attorney) engages in
gross exaggeration.

1 such evidence also bears on Mr. Moore's emotional distress, it is also admissible,
2 although Mr. Skilling may not opine on Mr. Moore's emotional distress.

3 **VI. Defendants' Motion to Strike**

4 The court DENIES this motion (Dkt. # 203), as there is no indication that
5 Plaintiffs' inclusion of evidence for the first time in their reply brief caused Defendants
6 any prejudice.
7

8 **VII. Conclusion**

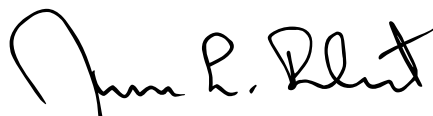
9 As stated above, the court rules as follows:

10 The court DENIES four of the pending motions (Dkt. ## 168, 170, 179, 203).

11 The court GRANTS in part and DENIES in part two of the pending motions (Dkt.
12 ## 166, 172).

13 In addition, Defendants' erroneous designation of two pleadings as "sealed
14 motions" has led to those pleadings being noted as motions on the court's calendar (Dkt.
15 ## 181, 182) Accordingly, the court directs the clerk to remove those documents from
16 the court's motions calendar.
17

18 Dated this 14th day of September, 2006.

19
20 

21 JAMES L. ROBART
22 United States District Judge
23
24
25
26
27
28